Supreme Court, U.S.
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Nos. 04-1528, 04-1530 and 04-1697

In The

Supreme Court of the United States

Neil Randall *et al.*,
Petitioners,
v.
William H. Sorrell *et al.*,
Respondents.

Vt. Repub. State Comm.,
Petitioners,
v.
William H. Sorrell *et al.*,
Respondents.

William H. Sorrell *et al.*,
Cross-Petitioners,
v.
Neil Randall *et al.*,
Cross-Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF RESPONDENTS, CROSS-PETITIONERS VERMONT PUBLIC INTEREST RESEARCH GROUP ET AL.

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February 8, 2006

QUESTIONS PRESENTED

1. Whether Vermont's mandatory limits on campaign expenditures by candidates for public office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

2. Whether the dollar amounts of Vermont's limits on campaign contributions to candidates for office are constitutional under the First and Fourteenth Amendments to the United States Constitution.

3. Whether Vermont's rebuttable presumption of coordination, which provides that an expenditure made by a political party or political committee that primarily benefits six or fewer candidates is presumed to be a related expenditure subject to contribution limits, is constitutional under the First and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

Neil Randall, George Kuusela, Steven Howard, Jeffrey A. Nelson, John Patch and Libertarian Party of Vermont: *Petitioners in 04-1528 and Cross-Respondents in 04-1697*;

Vermont Republican State Committee, Vermont Right to Life Committee, Inc., Political Committee, Vermont Right to Life Committee–Fund for Independent Political Expenditures, Marcella Landell, Donald R. Brunelle: *Petitioners in No. 04-1530 and Cross-Respondents in 04-1697*;

William H. Sorrell, John T. Quinn, William Wright, Robert Butterfield, Robert Simpson, Jr.; Vincent Illuzzi, James Hughes, David Miller, Joel W. Page, William Porter, Keith W. Flynn, James P. Mongeon, Craig Nolan, Dan Davis, Robert L. Sand and Deborah Markowitz: *Respondents in Nos. 04-1528 & 04-1530 and Cross-Petitioners in 04-1697*[1];

Vermont Public Interest Research Group, Inc., League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey (deceased), Phil Hoff, Frank Huard, Karen Kitzmiller (deceased), Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers and Maria Thompson: *Respondents in Nos. 04-1528 & 04-1530 and Cross-Petitioners in 04-1697.*

Pursuant to Supreme Court Rule 24.1(b), the Corporate Disclosure Statement within Respondent-Intervenors' Brief in Response and Partial Opposition to Petitions for Writs of Certiorari is incorporated by reference.

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[1] As this is an official capacity action, pursuant to Supreme Court Rule 35.3, State's Attorneys Dale Gray, Lauren Bowerman, George Rice, James McNight, and Terry Trono have been replaced by Robert Butterfield; Robert Simpson, Jr.; David Miller; William Porter; and Craig Nolan who are, respectively, the current officeholders.

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JURISDICTION OVER CROSS-PETITION

The Petition for Writ of Certiorari in No. 04-1528 was docketed on May 16, 2005. The Conditional Cross-Petition, No. 04-1697, was timely filed on June 14, 2005. This Court granted the Petition and Conditional Cross-Petition on September 27, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondents, Cross Petitioners Vermont Public Interest Research Group, League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Phil Hoff, Frank Huard, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers and Maria Thompson include Vermont citizen groups, individual voters, current and former legislators and officeholders, non-incumbent candidates for state office, Republicans, Democrats, and Independents, who supported and worked for the enactment of Act 64 of the 1997 Vermont Legislature, VT. STAT. ANN. tit. 17, §§ 2801-83 (2005) ("Act 64"), and intervened below to defend the law against this facial challenge to its constitutionality. They join in the Statement of the Case set forth in the brief of Respondents, Cross Petitioners William H. Sorrell *et al.*

SUMMARY OF ARGUMENT

1. The court of appeals correctly determined that Vermont's campaign expenditure limits, 17 VT. STAT. ANN. § 2805a, may be upheld consistent with *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), in view of the critically important governmental objectives those limits serve: deterring actual and apparent corruption, fostering public confidence in government, protecting candidate and officeholder time from the burden of fundraising, and assuring officeholder accountability through competitive elections. The limits were

enacted in response to deep and broad public concern about the detrimental impact of unlimited fundraising and campaign spending on Vermont's political system. These concerns were documented in lengthy public deliberations before the Vermont Legislature and confirmed by an exhaustive trial record that fully satisfies First Amendment scrutiny.

a. *Buckley*'s requirement of exacting scrutiny does not, as Petitioners urge, automatically invalidate expenditure limits no matter how compelling the interests they serve and no matter how tailored to the costs of running an effective campaign in local political conditions. Instead, it allows such limits to be upheld on a proper record. Under the "closer scrutiny" applicable to spending limits, *McConnell v. FEC*, 540 U.S. 93, 134 (2003), the Court should examine Vermont's post-*Buckley* experience to determine if new facts or legal interests demonstrate compelling justifications for Vermont's spending limits, and if the particular limits chosen by Vermont are sufficiently tailored. Requiring courts blindly to strike down all spending limits without weighing evidence or examining facts would be inconsistent with a proper understanding of our constitutional scheme, which must leave room for states' authority to safeguard their systems of representation in light of states' unique understanding of their own political environments.

b. Vermont's limits on campaign spending are justified by its compelling interests in deterring the reality and appearance of corruption and preserving public confidence in government. Those interests are reflected in the extensive legislative and court record in this case, which in turn reflects the State's increasingly troubled experience with unlimited campaign spending. With no spending restrictions, officeholders orient their legislative choices to contributors, fearing that an opponent will otherwise be able to out-raise and out-spend them. Even when contributions are limited, candidates remain dependent on special interests that can generate large aggregate contributions for the campaign funding race. The record contains frank admissions by

experienced officeholders that the legislative agenda too often is guided by the fundraising "arms race." The Vermont public perceived, with good reason, that legislative policy and access were for sale.

The spending limits also serve Vermont's vital interest in protecting the time of officeholders and candidates from endless preoccupation with fundraising. Act 64 will protect the quality of representative government by enabling elected officials better to perform their duties as representatives and permitting candidates to focus their time and attention on their broad constituency rather than on a narrow group of funding sources.

Vermont's spending limits, in addition, are necessary to assure officeholders' ultimate accountability to voters, which can only be secured in a system that allows meaningful electoral competition. Under a system of unlimited campaign spending, incumbents amass war chests that deter challengers and leave many elections effectively uncontested, thus diminishing officeholder accountability and robust public debate of issues. In this respect in particular, Act 64 furthers, rather than undermines, First Amendment interests.

c. The record demonstrates that Act 64's expenditure limits are narrowly tailored to serve these compelling interests. As the district court found based on an extensive record at trial, and the court of appeals confirmed, Vermont's spending limits are set at levels that permit candidates to run effective, vigorous campaigns. And, contrary to Petitioners' charge of "incumbent protection," the evidence demonstrates that in fact incumbents benefit the most from a system of unlimited spending because of their ability to out-raise and out-spend their challengers. Moreover, Act 64 places a lower spending limit on incumbents than on challengers, ensuring that the incumbent's traditional advantages will not be compounded by a spending advantage.

Nor are there feasible alternatives to spending limits that will allow Vermont to achieve its compelling interests. The alternatives suggested by Petitioners do not remedy the

concerns that prompted Act 64 but rather create equally troubling problems of their own. None of the alternatives proposed would permit Vermont to achieve its crucial goal of assuring the integrity of its electoral process.

d. While the Court need not look beyond *Buckley*'s standard of exacting scrutiny to uphold Vermont's spending limits, the Court may also uphold those limits as a content-neutral regulation of speech. They meet the governing standard for content neutrality set forth in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), because they are "*justified* without reference to the content of the regulated speech." The spending limits are narrowly tailored to serve a significant government interest and are set at a level allowing robust and effective campaigns, thus leaving open ample channels of communication.

2. Vermont's limits on contributions to candidates, 17 VT. STAT. ANN. § 2805, also satisfy this Court's well-established requirements. The Court's precedents repeatedly have confirmed the importance of limits on contributions as a means of deterring the perception and reality of corruption. Act 64 appropriately tailors the contribution limits to amounts that are "considered by the legislature, candidates and officials to be large contributions," J.A. 20, while allowing candidates to raise enough money to run effective campaigns. In asking the Court to second-guess the judgment of Vermont's elected lawmakers as to the contribution levels needed for effective campaigning, and to impose on Vermont the same limits that exist in much larger states where campaigns are far more expensive, Petitioners ignore that courts have no "scalpel to probe" the level at which a contribution limit should be set. *Buckley*, 424 U.S. at 21.

In addition, as set forth more fully in the Brief of Respondents, Cross-Petitioners William H. Sorrell *et al.*, Act 64's limits on political party contributions to candidates and the statute's rebuttable evidentiary presumption that certain party expenditures are "related expenditures" fully satisfy

constitutional requirements and should be upheld by the Court.

ARGUMENT

I. Vermont's Limits on Candidates' Campaign Expenditures Satisfy First Amendment Scrutiny.

A. Vermont's Expenditure Limits Are Permissible Under Buckley's *Standard of Exacting Scrutiny.*

Vermont enacted limits on candidates' campaign spending to protect the integrity and accountability of Vermont government and preserve the confidence of the State's citizenry in the electoral process.[2] Petitioners contend that any such regulation is *per se* forbidden by the First Amendment. That argument should be rejected. Act 64's spending limits further the most weighty governmental interests, including interests that are essential to fulfilling the purposes of the First Amendment.

Petitioners' principal contention is that this Court in *Buckley v. Valeo* created an absolute First Amendment right to engage in unlimited spending, no matter how great the

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[2] Act 64 set the spending limit for candidates for Governor at $300,000; for Lieutenant Governor at $100,000; for Secretary of State, State Treasurer, Auditor of Accounts, and Attorney General at $45,000; for State Senator or county office at $4000 plus – in the case of candidates for State Senator an additional $2500 for each additional seat in the Senate district; and for State Representative at $2000 in a single-member district and $3000 in a two-member district. 17 VT. STAT. ANN. § 2805a. Incumbent candidates for the offices of Governor, Lieutenant Governor, Secretary of State, State Treasurer, Auditor of Accounts, and Attorney General are entitled to expend only 85 percent of the spending limit for their respective offices, and incumbent candidates for State Legislature are entitled to expend only 90 percent of the spending limits for their offices. 17 VT. STAT. ANN. § 2805a(c). In 2005, the Legislature increased the spending limits by tying them to the Consumer Price Index. 17 VT. STAT. ANN. § 2805a(e). *See* Vermont Secretary of State, Guide to Vermont's Campaign Finance Law (November 2005), http://vermont-elections.org/ elections1/2005_cf_guide_1118.htm (last visited Feb. 7, 2006) (listing updated spending limits).

harms to governmental interests and no matter how closely a limit is tailored to local political conditions. In fact, *Buckley* requires "exacting scrutiny," 424 U.S. at 16, not automatic invalidation, and permits spending limits to be upheld on a proper record. Contrary to the contention that expenditure limits are forbidden, this Court has confirmed that they simply are subject to "closer scrutiny" than are limits on contributions. *McConnell*, 540 U.S. at 134; *FEC v. Colo. Republican Fed. Campaign Comm.* ("*Colorado Republican II*"), 533 U.S. 431, 440 (2001).[3] Petitioners' contrary reading attributes to *Buckley* a *per se* rule directly at odds with the Court's "strict scrutiny" jurisprudence; such review is not "strict in theory but fatal in fact." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (citations and internal quotations omitted).

This context, more than any other, calls for a careful application of constitutional scrutiny rather than the categorical imposition of *per se* rules. The Tenth Amendment preserves for the states "the power to regulate elections." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (citation and internal quotations omitted). States moreover play an essential role as laboratories of reform in our federal system. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The doubts expressed by the *Buckley* Court that expenditure limits would be necessary to protect the integrity of government are fully addressed by the record in this case. *Buckley* embraced the government's compelling interests in deterring the reality and appearance of corruption and assuring public confidence in government, 424 U.S. at 26-27, but believed, on the record before it, that the contribution limits of the Federal Election Campaign Act ("FECA"), Pub.

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[3] Although the Court confirmed in *McConnell* and *Colorado Republican II* that expenditure limits are subject to closer scrutiny, neither those cases nor any case before this Court since *Buckley* has reviewed a statute limiting candidates' expenditures.

L. No. 92-225, 86 Stat. 3 (1972), *amended by* Pub. L. No. 93-443, 88 Stat. 1263 (1974), alone would be sufficient to serve those interests. *See id.* at 56 ("There is no indication [in the record] that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient[.]").[4] Thus, *Buckley* rejected the assertion that spending caps were a necessary concomitant to contribution limits only as a matter of fact, not of law.

Nor did *Buckley* foreclose consideration of factual developments illuminating different compelling interests, such as protecting the time of officeholders and candidates, as well as assuring officeholder accountability through competitive elections, that could justify campaign spending limits. Three particular governmental interests were presented in *Buckley*: (1) deterring corruption and preventing evasion of the contribution limits; (2) equalizing the financial resources of candidates; and (3) restraining the cost of election campaigns for its own sake. 424 U.S. at 55-56. This Court did not broadly hold that other compelling interests could never be considered; rather, it stated that "[n]o governmental interest *that has been suggested* is sufficient to justify [the federal spending limits]." *Id.* at 55 (emphasis added).

Vermont's thirty years of experience post-*Buckley*, reflected in the record here, demonstrate that, in fact, limits on overall spending are necessary to respond to the realities of campaign-finance-related corruption and undue influence, assure public confidence, and protect the quality of representative government. Pet. App. 128a-35a & n.13; *infra*

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[4] Prior to the Federal Election Campaign Act of 1971 and the 1974 amendments to FECA, neither individual contributions nor spending in federal elections had been subject to meaningful limits. *See* Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, *in* ANTHONY CORRADO ET AL., THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 15-17 (2005) (describing ineffectiveness of pre-FECA limits).

this Part; *McConnell*, 540 U.S. at 152 (government entitled to take into account "the realities of political fundraising" revealed by the record).

Experience also has not borne out *Buckley*'s assumption (*see* 424 U.S. at 19) that a restraint on spending would operate identically to a direct restraint on speech. In fact, as demonstrated more fully *infra*, the post-*Buckley* record shows that campaign spending is a function of many factors unrelated to the needs of communication and debate, including special interests' determination to secure favorable governmental policies, and the use of campaign war chests to deter challengers. Even the research of Petitioners' expert establishes that increased campaign spending reflects not the increased costs of getting candidates' messages out to voters, but instead the fact that "[t]he more favors the government has to give out, the more resources that people will spend to obtain those favors." Ex. VI:2202, Tr. III:206-07 (Lott); *see* Ex. VI:2264 (characterizing as a "myth" the contention that increased costs of television advertising account for increased campaign expenditures).[5]

A rule automatically invalidating expenditure limits would disregard the significance of the interests underlying campaign finance laws.[6] As Respondents now demonstrate,

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[5] "Tr." refers to the trial court transcript, the entirety of which was made part of the Second Circuit record; "Ex." refers to the sequentially paginated trial exhibit appendices submitted to the Second Circuit.

[6] The lack of merit in such a mechanical rule of invalidation is particularly clear in light of the facts of this case. Petitioners state that even an "unknown challenger" can run an effective campaign in Vermont for "$4,000 to $6,000 in the house, $30,000 to $50,000 in the senate, and $600,000 to $800,000 for governor." VRSC Br. 42. Yet Petitioners' proposed First Amendment right to engage in unlimited campaign spending would require this Court to invalidate Vermont's limits without *any* consideration of the compelling interests they serve, even if the limits were set at the level Petitioners *concede* to be adequate for an effective campaign by the *most* disadvantaged candidates. *But see infra* Part I.C.1 (demonstrating that Petitioners' figures are in fact inflated and that fully effective campaigns can be conducted under Act 64's limits).

the interests underlying spending limits are notably of constitutional magnitude. Deterring corruption, fostering public confidence in government, protecting candidate and officeholder time, and assuring officeholder accountability through competitive elections all safeguard the political representation that is the essence of our constitutional democracy. By serving these interests, Vermont's spending limits "protect the integrity of the electoral process," the "very 'means through which a free society democratically translates political speech into concrete governmental action.'" *McConnell*, 540 U.S. at 137, 158 (recognizing protection of integrity of electoral process as a "constitutional interest[]") (citation and internal quotations omitted).[7] "[W]hat is involved here is the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process[]" – issues "not less than basic to a democratic society." *United States v. UAW-CIO*, 352 U.S. 567, 570 (1957) (addressing Corrupt Practices Act).

B. *Vermont's Weighty Interest in Preserving the Integrity of Its Democratic Process Justifies the State's Limits on Candidates' Campaign Spending.*

1. The Pressures of Unlimited Fundraising Foster Corruption, Undue Influence, and Public Cynicism About the Integrity of Vermont Government.

Deterring corruption of elected officials and avoiding the appearance of corruption are prototypical compelling governmental interests. *McConnell*, 540 U.S. at 143-54; *Buckley*, 424 U.S. at 26-27. The interest in deterring

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[7] Although *McConnell* addressed contribution limits, the Court stated that its analysis "reflects more than the limited burdens [the contribution limits] impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits." 540 U.S. at 136.

corruption "extends beyond preventing simple cash-for-votes corruption to curbing undue influence on an officeholder's judgment, and the appearance of such influence." *McConnell*, 540 U.S. at 150 (citation and internal quotation marks omitted). Manifestly, a state has a compelling interest in maintaining the public's "confidence in the system of representative Government." *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973). *See also McConnell*, 540 U.S. at 187 ("Congress has a fully legitimate interest in maintaining the integrity of federal officeholders"); *cf. id.* at 317 (Kennedy, J., concurring in the judgment in part and dissenting in part) (campaign regulations that directly address "candidates' and officeholders' quest for dollars" lie closer to core of *Buckley*'s anti-corruption concern than measures less directly concerned with candidates' solicitation of funds).

a. Without spending limits, Vermont candidates increasingly feel compelled to raise the maximum amount possible to forestall the possibility of being outspent. Witnesses described "the sort of stampede or nuclear arms race mentality that we currently have, which is just keep building the bank because you never know what's going to happen." Tr. VIII:57 (Smith). "I guarded against [being outspent] by raising more money than I thought that I'd need and more money than I thought [my opponent] would raise or spend." Tr. V:32 (Hooper). *See also* Tr. VII:75-76 (Rivers); Tr. II:198 (Patch). Instead of promoting a candidate's autonomous choice of how much to spend in disseminating his message, the absence of spending limits "condemns [candidates] to a cyclical prisoners' dilemma, where each candidate must continue to raise and spend more money in order to prevent the other from obtaining an advantage." Burt Neuborne, *Is Money Different?*, 77 TEX. L. REV. 1609,

1617 (1999).[8] As the court of appeals observed, "[t]he significance of the spending cap lies not in reducing the amount of money spent on campaigns, but rather in eliminating this potential of being vastly outspent that leads to the 'arms race' mentality among candidates and elected officials." Pet. App. 149a.

Petitioners point out that campaigns in Vermont are "relatively low-budget affairs." Randall Br. 32. However, while it is true that high levels of spending are not *necessary* to communicate effectively with voters in Vermont, candidates often raise more than they need because they fear an opponent may raise more, Tr. VII:75-76 (Rivers); Tr. V:31-32, 51 (Hooper); Tr. VIII:57-58 (Smith); Tr. IX:134 (Ready), or because a campaign war chest deters potential opponents, Ex. I:0394-0395 (Frothingham); Tr. III:163-164 (Lott); Tr. X:80 (Gross).

b. The debts incurred in this money chase come due after election day. Vermont's experience demonstrates that, under a system of unlimited campaign expenditures, the fundraising chase directly drives legislative and governmental policy in a manner antithetical to the proper functioning of representative government. As the court of appeals found, "[t]he agenda of candidates and elected officials is affected by the perceived need to raise increasing amounts of funds. . . . This affects what issues are put on the agenda, what issues are taken off, and how certain issues are addressed." Pet. App. 150a. It continued, "[e]ven with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them, and candidates must give them special attention because the contributors will pay for their campaigns." *Id.* 134a. Even plaintiff Donald Brunelle acknowledged that when a

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[8] As Professor Neuborne observes, "[t]he vast bulk of candidates are no more autonomous under *Buckley* in setting levels of campaign spending than were the Soviet Union and the United States in setting levels of military spending during the height of the Cold War." *Id.*

candidate solicits donations, "now you're beholden to those people that you're asking in some cases." Ex. VII:2706.

Both at trial and during the legislative process leading to the enactment of Act 64, witnesses intimately familiar with Vermont politics repeatedly described the growing influence of fundraising pressures in determining public policy, and the resulting harm to the integrity of state government. *See* Tr. IX:88-95, 100-12; Ex. III:0785, 0787; Ex. V:1766 (testimony and exhibits on influence of slate industry over development permit exceptions and bottle industry donors over bottle redemption bill). Representative Marion Milne, a Republican and a defendant-intervenor, commented during floor debate on Act 64: "We have candidates who will do anything to raise money. What they have to offer is the same commodity as in Washington – access to the leaders, access to the full attention of those who are supposed to be our models of integrity." Ex. II:0732.[9]

Because of the pressures to avoid being bested in the race for campaign funding, the consequences of losing an entire industry as a source of donations directly influence the actions of legislators. "'We've already lost the drug money, and I don't need to lose the food manufacture[r] money too'" becomes the dubious touchstone of policymaking. Pet. App. 131a; *see* Tr. VII:70. A former Republican Lieutenant Governor of Vermont, Peter Smith, confirmed that the need for campaign cash constantly intrudes on policy decisions: "You have to initially consider . . . whether or not you want to risk losing the financial support or, in the worst case, having that financial support go to a primary opponent or to a person who opposes you in a general election." Tr. VIII:26. As one example, Mr. Smith described how the campaign funding provided by a professional group (ophthalmologists) "absolutely was" a factor as he considered casting a tie-

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[9] *See also* Ex. II:0505 ("[c]ampaign fundraising and lobbying are inextricably, completely linked in Vermont"); Tr. VII:74-75; Ex. III:0763.

breaking vote on legislation affecting the group. Tr. VIII:41-42; *see* Tr. VIII:43 (it "tarnished the process").[10]

Regardless of the formality or informality of the methods used, a special interest's financial clout with candidates extends far beyond the size of individual contributions when the need for funds is limitless. Donors affiliated with a particular interest can coordinate the timing of their contributions through formal or informal "bundling" practices,[11] or can contribute at fundraising events where a company or industry group is given access to legislators.[12] Or, in a small state such as Vermont, it often will simply be obvious when, for example, the slate industry or health care interests are generating multiple contributions to candidates.

This spending chase also saps public confidence in government, because the perception of corruption is a function not just of the size of donations, but also of high overall levels of fundraising. The Vermont Legislature found that "public involvement and confidence in the electoral process have decreased as campaign expenditures have

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[10] "[T]he merits of the case were, if you will, infused . . . by the financial power of the groups. . . . We were talking about merit on the one side, which was a technical judgment, and power as represented in money on the other side." Tr. VIII:42.

[11] *See* Pet. App. 100a (noting "widespread use of manipulative contribution devices, such as 'bundling,' which enable special interests to direct large quantities of money by way of individual contributions to particular candidates"); Ex. III:0783; Tr. V:63-64; Ex. I:0218-19. "Donors and recipients understand that bundled contributions are not isolated contributions, but a block of gifts coming from the same source." Lisa Rosenberg, Center for Responsive Politics, *A Bag of Tricks: Loopholes in the Campaign Finance System* (1996), *available at* http://www.opensecrets.org/ pubs/law_bagtricks/contents.asp (last visited Feb. 7, 2006). The impact of bundling cannot be addressed by a ban on indirect donations, because donors can easily coordinate the timing of their contributions without having to transmit them indirectly.

[12] Tr. IX:112-13 (Ready); Tr. VII:58-61 (Rivers); Ex. III:0766; *see also id.* at 0767-768, 0770, 0755 (news articles on use of fundraisers to provide access).

increased," lessening "[c]itizen interest, participation, and confidence in the electoral process." J.A. 20-21.[13]

Petitioners argue that Vermont officeholders are merely showing a healthy responsiveness to supporters when they make legislative decisions based on fundraising needs. VRSC Br. 49. This argument is misguided. A legislative policy decision based on the need for campaign cash is not equivalent to a legislative policy decision based on the needs of voters. If it were, anti-bribery laws would become constitutionally suspect. "[S]uch influence of campaign contributors is pernicious because it is bought. . . . Quid pro quo corruption is troubling not because certain citizens are victorious in the legislative process, but because they achieve the victory by paying public officials for it." Pet. App. 134a. "Implicit . . . in the sale of access is the suggestion that money buys influence." *McConnell*, 540 U.S. at 154. The First Amendment should not be transformed into an instrument requiring Vermonters to accept this state of affairs.[14]

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[13] *See* Tr. VIII:58-59 (Smith) (when candidates' focus is "raise as much money as you can raise," it "leads to the sense that the process is about someone else and for someone else and available to other people" and effect on public perception is "corrosive"); Tr. V:83-84 (Hooper) (the concern "applies as well to the spending of money" because citizens "feel powerless and extremely cynical" when they see "campaigns costing ever more money"); Ex. III:0916-17 (Douglas) (big spending means big fundraising, and creates appearance of corruption); Ex. III:1040-41 (Gross report) (high-spending campaigns can dampen participation by reinforcing the public's cynicism about the impact of money on the political process); Ex. V:1831-32.

[14] *Buckley* observed that no harm would result if a candidate raised one dollar from a million people and then spent it all. 424 U.S. at 56 n.64. From this, Petitioners conclude that funds "legally raised" cannot give rise to the reality or perception of corruption. Randall Br. 26. But, as the court below noted, "the reality of campaign financing in Vermont is a far cry from [Buckley's] idyllic vision of political fundraising." Pet. App. 133a. Instead, the financial constituencies that can generate large funding amounts, not the hypothetical one-dollar donor, command the candidate's attention. *Buckley* does not forbid courts from taking into account "the

c. Spending limits alter the dynamic of unlimited indebtedness flowing from unlimited fundraising in Vermont. First, when a candidate knows the upper limit of funds that will be necessary for a campaign, the pressure to court and orient policymaking decisions to a particular special interest based on its financial clout is greatly reduced, since each additional dollar no longer is irreplaceable. Candidates will no longer be locked into "the sort of stampede or nuclear arms race mentality that we currently have." Tr. VIII:57 (Smith). As the Second Circuit noted, "with a limit on how much money can be spent, elected officials testified that they would be more willing to take a position which a particular industry opposed." Pet. App. 150a.

Second, spending limits enhance voters' ability to hold candidates accountable for financing their campaigns in ways that create indebtedness to particular narrow interests. When there is an upper limit on the funds a candidate may collect, the excuse that "I can't unilaterally disarm" falls away, making candidates more accountable to voters for the funds they pursue. In the absence of such a limit, a candidate who courts large aggregate sums from, say, labor or the financial services industry has a ready-made excuse: "I can't afford to limit my fundraising because my opponent may outspend me if I do."[15] Voters have little ability to punish candidates at

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realities of political fundraising" revealed by the record. *McConnell*, 540 U.S. at 152.

Nor are Petitioners correct in arguing, per Judge Winter's dissent, that *Buckley* fully considered and addressed the array of practices, such as bundling, that can erode the effectiveness of contribution limits in combating the reality and appearance of corruption. Judge Winter points to the "highly publicized scandal" of pooled contributions by the dairy industry at the time of *Buckley*. Pet. App. 262a. But those defending the FECA limits in *Buckley* argued that FECA's *contribution* limits and its regulation of political committees would address the abuses revealed by the dairy industry's practices. Br. for Appellees Center for Public Financing of Elections et al. 131-32 (Nos. 75-436, 75-437).

[15] *See* Justin M. Sadowsky, *The Transparency Myth: A Conceptual Approach to Corruption and the Impact of Mandatory Disclosure Laws*, 4

the ballot box for incurring such indebtedness to special interests, because the candidate's opponent is doing the same.

Third, by reducing candidates' preoccupation with fundraising, spending limits will strengthen public confidence and participation in government in Vermont. By including limits on both spending and contributions, a principal sponsor of the bill explained that the legislation sought to " turn around the cynicism and the lack of participation on the part of many ordinary people that believe that their government is not about them, but about powerful, special interests. . . . [T]hat trend is corrosive and damaging to democracy . . .." Tr. VII:88 (Rivers).

2. Unlimited Campaign Spending Harms the Integrity of Vermont State Government Because Candidates Spend Inordinate Time and Attention on Fundraising.

Concern over the amount of time that candidates devote to fundraising was a critical part of the public debate leading to the enactment of Vermont's spending limits, and was confirmed by trial testimony. *Cf. Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting) ("For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising"); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 649-50 (1996) (Stevens, J., joined by Ginsburg, J., dissenting) ("It is quite wrong to assume that the net effect of limits on contributions and expenditures–which tend to . . . free candidates and their staffs from the interminable burden of fund-raising . . . –will be adverse to

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CONN. PUB. INT. L.J. 308, 335-37 (2005) (describing negative consequences to candidates who turn down campaign donations).

the interest in informed debate protected by the First Amendment.").

a. As the court of appeals found, "the evidence in Vermont is clear that the pressure to raise large sums of money greatly affects the way candidates and elected officials spend their time." Pet. App. 140a. "[U]nlimited [campaign] expenditures have compelled candidates to engage in lengthy fundraising in order to preempt the possibility that their political opponents may develop substantially larger campaign war chests," *id.* 139a,[16] and "financial necessity . . . requires that elected officials spend time with donors," *id.* 141a-42a; *see id.* 140a (donors able to "dominate candidates' time."); Tr. IX:166-67, 194; Tr. V:29-30; Tr. VII:24; Ex. III:0896 (all describing how fundraising pressures allow donors to command officeholders' time).[17]

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[16] *See, e.g.*, Ex. I:0092 (fundraising demands required Vermont candidates to concentrate on "out-of-state fundraising events" in "Washington, New York or California") (floor speech of Sen. William Doyle (R)); *id.* (Act 64 necessary so that "there will be increased time for real debate; that candidates will be able to concentrate more on issues rather than raising public money"); Ex. III:0773 (prominent Vermont business lobbyist observes that "[p]oliticians are forced to spend as much time begging as they do campaigning"); Tr. VIII:24 (Smith) (the farther a candidate progresses politically, "ineluctably, the more time you spen[d] . . . raising money and the more attention you pa[y] to the people who gave you big money"); Tr. V:119 (Hooper) (in running campaigns with no limits, the "way I would spend my evenings often . . . would be back hustling campaign money" instead of making contact with voters); Ex. I:0095 (legislative finding noting that candidates for statewide office "are spending inordinate amounts of time raising campaign funds").

[17] *Buckley* did not address the governmental interest in protecting the time of officeholders as a basis for candidate spending limits. *See* Pet. App. 138a-39a; Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U. CHI. L.J. (forthcoming 2006) (manuscript at 30 n.28, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=816244 (last visited Feb. 7, 2006)); Vincent Blasi, *Free Speech and the Widening Gyre of Fundraising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1287 (1994).

The time demands of fundraising harm Vermont's representative process in several related ways. The time occupied by fundraising is a distraction from the representative function, as confirmed by the district court's factual finding that "the need to solicit money from large donors at times turns legislators away from their official duties." Pet. App. 36a. This has real costs for the quality of representation, a concern of constitutional dimension in any democracy. As one scholar has observed,

> [T]here is a failure of representation when candidates spend as much time as most of them now do attending to the task of fund-raising. This feature of modern representation should trouble those who favor close constituent control as well as those who favor relative independence for legislators; those who favor an "aristocracy of virtue" as well as those with more populist ideals regarding who should serve . . . . Whatever it is that representatives are supposed to represent . . . they cannot discharge that representational function well if their schedules are consumed by the need to spend endless hours raising money and attending to time demands of those who give it.

Blasi, *supra*, at 1304.[18]

The pressures of unlimited fundraising also undermine the role of the campaign itself as a forum for open and robust public debate. In a democracy based on ideals of self-government, campaigns for public office do not exist solely to allow one-way communication of a candidate's views to the electorate, but also importantly serve as a principal means

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[18] *See also* Richard Briffault, Nixon v. Shrink Missouri Government PAC*: The Beginning of the End of the* Buckley *Era?*, 85 MINN. L. REV. 1729, 1769-70 (2001); Alexander, *supra*, at 12-17 (describing evidence of damage to the representative function).

of "educating candidates – preparing them to most effectively represent the people." Alexander, *supra*, at 37. "In order to function fully, representative democracy requires that the people be able to educate and even instruct their elected officials, so that their will may be done in government." *Id.* The process of dialogue and education is woefully shortchanged if a candidate's time is preoccupied with courting and listening to donors rather than to the candidate's much larger voting constituency.

The district court, after a ten-day trial, found that Vermont's spending limits are "an effective response" to "certain compelling governmental interests not addressed in *Buckley*," including "'[f]reeing office holders so they can perform their duties.'" Pet. App. 65a (citations omitted). If campaigns are governed by spending limits, explained one legislator:

> I can spend the whole rest of my campaign, once I have raised that money, out with the public . . . . I can go door to door. I can go around to local events. I can go to the county fairs. I can have a little booth, you know, and be talking to people. I am not going to be locked away, you know, in the Democratic Party somewhere or in my own office somewhere making fundraising calls.

Tr. IX:129 (Ready). *See* Tr. VII:72, 88 (Rivers); *see also* Tr. V:119 (Hooper); Tr. VIII:23-24 (Smith); Tr. IX:194-95 (Pollina).

Notwithstanding the relatively low costs of Vermont campaigns, the evidence canvassed above, the findings of the Vermont Legislature, and the findings of both courts below all establish that the distractions of fundraising already have distorted the representative process in Vermont and that the problem will continue to worsen as fundraising in one election raises the bar for the next. This Court has decisively rejected the contention that "a State's political system [must] sustain some level of damage before the

legislature could take corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). That principle applies fully here.

b. Petitioners err in arguing that Vermont should address its time-preservation interest by raising or eliminating the State's limits on the size of contributions. VRSC Br. 43-44. That approach is implausible because it would require the State to abandon its compelling interest in deterring the corruption that stems from candidates' receipt of large contributions (*see infra* Part II), and thus would "'deny to the [state] in a vital particular the power of self protection'" *McConnell*, 540 U.S. at 224 (quoting *Burroughs v. United States*, 290 U.S. 534, 545 (1934)).

Nor is there merit to the argument that contribution limits create the problem of excessive attention to fundraising. Only a comprehensive system in which both contributions and expenditures are subject to some reasonable limit can address the State's compelling interests in time-preservation and deterring corruption. In a system with no spending limits and no contribution limits, the time devoted to fundraising – and to courting the wealthiest interests at the expense of outreach to a broad constituency – will only continue to increase. If one candidate can raise a large war chest from a handful of donors, an opponent wishing to eschew such indebtedness will be forced to spend even more time fundraising to catch up than if all candidates faced limits on the size of contributions. And because a candidate would never know how much an opponent might raise, the pressure to engage in unlimited fundraising would be unabated. "No package of campaign finance reforms will change substantially how representatives spend their time unless war chests are made unimportant." Blasi, *supra*, at 1285.[19]

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[19] Nor would raising the contribution limits reduce the time candidates spent on fundraising. When Congress raised FECA's hard-money limits from $1,000 to $2,000 in 2002, *see* 2 U.S.C. § 441a, federal candidates did not raise the same overall amount in larger chunks; instead,

3. The Critical Interests Served by Electoral Competition Justify Vermont's Spending Limits.

In addition to the compelling interests recognized by the Second Circuit just discussed, other substantial governmental interests support the constitutionality of Act 64's expenditure limits. The accountability of elected officials and the very possibility of a robust debate of the issues depend upon competitive elections.

> Electoral competition is . . . a central component of democratic governance. In many respects, the ultimate weapon of public accountability in a democratic system is the ability of citizens to remove political actors through elections. And, electoral competition is the mechanism that keeps accountability viable. Electoral competition requires that voters be given a choice among at least two viable candidates. High levels of campaign spending pose[] a threat to such competition because large incumbent war chests tend to discourage serious challengers.

Ex. III:1044-45 (Report of Dr. Donald Gross). *See* Tr. IX:132-33 (Pollina); Tr. IX-132 (Ready); Ex. I:0394-96 (testimony before legislative committee). Unlimited

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they simply increased their overall fundraising, expanding the arms race and placing ever more emphasis on fundraising. Indeed, in 2004, after the federal hard-money contribution limits were raised, both major-party presidential candidates opted out of the public financing system for their primary elections, with President Bush raising over two-and-a-half times more than in his 2000 primary ($269.6 million in 2004 compared with $95.5 million in 2000) and the Democratic nominee raising nearly five times the 2000 primary amount ($234.6 million for Senator Kerry in 2004 versus $48.1 million for Vice President Gore in 2000). Federal Election Commission, 2004 Presidential Campaign Financial Activity Summarized (Feb. 3, 2005), *available at* http://www.fec.gov/press/press2005/20050203pressum/20050203pressum.html (last visited Feb. 7, 2006).

campaign spending, by undermining the very conditions needed to promote a debate that is "uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), thus threatens, rather than promotes, First Amendment values. As the Vermont Legislature found, "Robust debate of issues . . . [has] decreased as campaign expenditures have increased," and many Vermonters are unable to seek election to public office due to the great financial burden of running campaigns. J.A. 20.

Vermont has conducted its elections without limits on campaign spending since 1976. During the nine election cycles prior to the enactment of Act 64, only one incumbent lost a campaign for any statewide office. In many of these elections, the incumbent had no viable challenger. For the office of State Treasurer, the incumbent had no major opposition in five of those races; for Secretary of State, the incumbent had no major challenger in four races; for Attorney General, the incumbent had no major challenger in six races. Ex. V:1692-94.[20]

Thus, Petitioners' claim that unlimited spending allows challengers to overcome the incumbents' advantages rests on the flawed assumption that most challengers are capable of outspending incumbents. Especially as races become more expensive, incumbents generally have an easier time raising

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[20] In elections for Congress, campaign expenditures also have remained unlimited since 1976. Congressional incumbents nevertheless have consistently enjoyed re-election rates of over 90%. Ex. III:1046. In 2004, 98.7% of House incumbents won re-election. (This figure, which excludes the two House elections in which incumbents faced each other, was calculated based on data from Center for Responsive Politics, 2004 Election Overview, Winning vs. Spending, *available at* http://opensecrets.org/overview/bigspenders.asp?Display=A&Memb=H&Sort=D (last visited Feb. 4, 2006). Challengers for a House seat in that same year raised $192,945 on average, while House incumbents raised an average of $1,122,385. By contrast, in Albuquerque, New Mexico, which enforced mandatory spending limits for city elections for over twenty-five years, no incumbent mayor was re-elected while the limits were in force. Tr. X:87-88 (Gross).

money for their races than challengers because donors have far more incentive to contribute to those who already hold sway over important public policy initiatives than to candidates who have not yet won office. Tr. III:212 (Lott); Tr. X:80 (Gross); Tr. IX:231-32 (Pollina).[21] In the three election cycles prior to the effective date of Act 64, the gubernatorial challengers were consistently outspent, and defeated, by the incumbent. J.A. 84-86; *see also* Pet. App. 42a-44a. Senate incumbents in Vermont spent more money than challengers in each of the three election cycles studied. J.A. 87.[22]

The many advantages enjoyed by incumbents, such as their greater name recognition, often therefore are simply compounded by the incumbents' ability to outspend the challengers as well. Even Petitioners' witnesses confirmed that the worst-case scenario for a challenger is when an incumbent's built-in advantages are combined with the ability to outspend the challenger. *See, e.g.*, Tr. I:210 (Garahan).

Empirical research further demonstrates that, for challengers to be competitive, the important factor is not the absolute level of their spending, but the ratio between their spending and that of the incumbent. Ex. III:1048. Act 64 guarantees that any challenger who is able to raise the full amount permitted by the limits will be able to *outspend* the incumbent, because the spending limits applicable to incumbents are lower than those applicable to challengers.

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[21] Indeed, some of the Petitioners in this case were outspent by the incumbents they challenged and had never been able to raise sums for their campaigns as large as those permitted by Act 64's limits. *See* Tr. II:32, 34 (Libertarian Party Chair Scott Berkey); Ex. V:1755 (Brunelle). It is absurd for Petitioners to suggest that they would have done worse under Act 64, which permits challengers to outspend incumbents. *See also* Ex. VIII:3076-77 (Petitioners' witness Wright); Tr. I:68-70 (Petitioners' witness Snelling).

[22] In the Vermont House, while challengers on average spent slightly more than incumbents, both challengers and incumbents spent less than the Act 64 limits would allow, and the limits therefore would not impede House challengers in these very low-budget races. J.A. 88.

Pet. App. 7a. The pro-competitive impact of this system is confirmed by one of Petitioners' expert witnesses, whose research indicates that imposing lower spending limits on incumbents than on challengers would make campaigns more competitive over time. Tr. III:217-19 (Lott).[23]

Research not available to the *Buckley* Court further demonstrates that high levels of campaign spending not only inhibit the robust debate fostered by competitive elections, but also do nothing to encourage voters' engagement with the electoral process. Examination of the impact of spending levels shows that, if anything, higher spending discourages individual voter engagement. While higher spending may increase candidate name recognition, it tends to decrease the likelihood that a voter will be interested in an election, concerned about the outcome of the election, or able to discern the ideological placement of the candidates. Tr. X:71-76 (Gross); Ex. V:1800-1805 (analysis of campaign spending and cognitive engagement); Ex. V:1810-1815 (statistical basis of analysis). Higher spending also is more likely to decrease an individual's likelihood of participating in the election. Tr. X:56-58 (Gross). The reality is thus very different from the assumption of the Court in *Buckley*, based on the limited record before it, that the more candidates spend, the more they "make their views known" to the electorate, thus enabling the electorate better to evaluate

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[23] Petitioners cite a witness's complaint that incumbents should be limited to fifty percent of the challenger's spending to eliminate entirely the advantages of incumbency. VRSC Br. 43. This complaint is illogical because the system of unlimited spending that Petitioners advocate does not hold incumbent spending to fifty percent of the challenger's spending either. The relevant question cannot be whether the spending limits completely eliminate incumbents' advantages, which exist independently of Act 64, but whether, as the evidence shows, the limits are likely to make elections more competitive than the current system.

candidates and "choos[e] among them on election day." 424 U.S. at 52-53.[24]

Although Petitioners emphasize *Buckley*'s holding that the mere desire to enhance the relative voices of those who lack campaign funds did not justify FECA's spending limits, 424 U.S. at 48-49, the interest in promoting electoral competition is of a wholly different character. It is based not on concerns about whether one candidate is poorer than another, nor whether one speaks more loudly than another, but instead on the goal of securing officeholders' ultimate accountability to voters, which can happen only in a system that allows meaningful competition. "[T]he possibility that in any given election the people may exercise their authority to vote out current officeholders[] is the ultimate security of popular control over government." Richard Briffault, *The Return of Spending Limits: Campaign Finance After* Landell v. Sorrell, 32 FORDHAM URB. L.J. 399, 433 (2005). As noted, that possibility is thwarted when incumbents combine their built-in advantages with the ability to out-raise and out-spend their challengers.[25] The same lack of voter choice and control results in an open-seat race when a candidate with a huge funding advantage enters the race and discourages other challengers from coming forward. *Id.* at 434. "[T]he interest in competitive elections . . . is constitutionally compelling because electoral competitiveness is essential to the public

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[24] Indeed, polling data shows that Vermont voters view less expensive sources of information, such as public forums, meeting the candidate in person, and unpaid news coverage, as more important sources of information about candidates than paid media. Ex. III:0846-0847, 0851.

[25] Moreover, this dynamic is often at work even in races in which the incumbent ends up spending little. Serious challengers often do not run because they recognize that the incumbent can gear up his fundraising operation to meet any real threat from a challenger. Tr. X:33; *see also* Tr. VII:148. A system of unlimited spending thus paradoxically may result in a quieter campaign than would be true if limits were in place that assured challengers they will not be badly outspent.

accountability that elections are intended to promote." *Id.* at 435.

C. Vermont's Limits Are Sufficiently Narrowly Tailored to Satisfy Exacting Scrutiny.

The court of appeals remanded the case for the district court to determine whether Vermont's spending limits are sufficiently narrowly tailored to satisfy constitutional scrutiny. That aspect of the judgment should be reversed, and this Court should enter a judgment holding that the expenditure limits satisfy the First Amendment, as the record adequately demonstrates the narrow tailoring of Vermont's spending limits. Act 64 permits candidates to amass the resources needed for effective campaigns, and there are no less restrictive alternatives that will adequately serve Vermont's compelling interests.

1. Act 64 Permits Candidates to Amass the Resources Needed for Effective Advocacy.

Vermont's spending limits are narrowly tailored to allow candidates to "amass[] the resources necessary for effective advocacy," *see Buckley*, 424 U.S. at 21.[26] In setting the limits, the Vermont Legislature considered such factors as the State's population, costs of campaigning, past spending patterns in elections, the testimony of numerous witnesses at hearings, and legislators' knowledge of campaign costs. Ex. I:92, 254-63, 267; Ex. II:443, 533-34, 645-47, 664-80; Ex.

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[26] Whereas the VRSC petitioners agree that the narrow tailoring inquiry examines the resources necessary for effective advocacy (Br. 29), the Randall Petitioners argue that any effort to "fine-tune" the limits is futile because *any* ceiling on expenditures will "necessarily restrict the spending of some candidates" and is therefore unconstitutional, Br. 37. This merely reiterates that spending limits are not subject to exacting scrutiny but are unconstitutional *per se*, to which Respondents already have responded. Under *Buckley*'s exacting scrutiny standard, the spending limits are subject to "closer scrutiny" than contribution limits, *McConnell*, 540 U.S. at 134; *Colorado Republican II*, 533 U.S. at 440; not automatic invalidation.

V:1686-1712, 1720-34; Tr. IX:226-28; Tr. X:18-20; *see also* Pet. App. 32a-33a, 100a.[27] Vermont candidates can communicate their messages to the public and run vigorous campaigns under Act 64's limits. The district court, which was closely familiar with local realities, so found after canvassing extensive evidence on Vermont campaigns and past spending patterns. App. 42a-44a.

The limits of Act 64 are tailored to local political conditions. With respect to the State Legislature, most candidates over the three election cycles prior to Act 64 spent less than the amounts allowed under the limits. Pet. App. 42a-43a.[28] In 1998, all categories of House candidates – incumbents, challengers, Democrats, Republicans, Progressives – spent less than the Act 64 spending limits on average. J.A. 88. Because Vermont House districts are so small, effective House campaigns have relied primarily on

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[27] The Vermont Legislature also created a mechanism for reviewing the limits through Section 23 of Act 64, which required two House and Senate committees to study the impact of Act 64 on the 2000 election cycle, "evaluate the effects of contribution and expenditure limitations and public financing on the election process," and report their findings to the General Assembly. *See* Ex. I:0105. Thus, had the expenditure limits not been enjoined, this review mechanism would have allowed legislative evaluation of how the limits operated in practice.

[28] Vermont House and Senate candidates generally do not advertise on television, because of the "lack of congruence between media markets and district boundaries." J.A. 42-43, *see also* Pet. App. 44a; J.A. 24-30 (plaintiffs' Responses to Requests for Admissions). Nor do most legislative candidates use paid campaign staff. J.A. 42-43; *see also* Randall Br. 9 (acknowledging that in legislative campaigns, use of mass media is generally limited to mailings and newspaper ads). Even when television is used, "primarily in campaigns for statewide office – it is relatively inexpensive compared to other states." Pet. App. 44a. Evidence showed that candidates could buy a thirty-second, prime-time, non-preemptible ad (the most expensive kind) on a network station for as little as $350. Ex. III:0873. Moreover, even legislative candidates can afford radio, direct mail and cable television advertising under Act 64's limits. Ex. IV:1402 (Brownell); Tr. IV:51 (Meub). A package of three thirty-second ads on CNN in Burlington during the most expensive time slot could be purchased for $45. Ex. III:0861.

direct contact between candidates and voters, including door-to-door campaigning, attending community events, and other methods of meeting voters. Tr. VII:16 (Young); Tr. IX:51 (Bristol); Ex. V:1825-1827 (Fiorillo); Tr. X:185 (Kitzmiller); Tr. IX:220-21 (Pollina); Tr. IX:129, 134-35 (Ready); Tr. II:17 (Berkey). Petitioner Brunelle distributed campaign literature by visiting all 2300 homes in his district in four days in each of his three House campaigns and said there was "no question in my mind" that the voters knew his views on the issues, although he never spent in excess of Act 64's limits. Ex. VII:2696, 2700.[29]

In the Senate, average spending by major party candidates was below the spending limits in all types of districts save for single-member districts. J.A. 87.[30] Overall, Senate incumbents spent more money than challengers in each of the three election cycles that were studied, and thus would be more affected by the limits than challengers. *Id.* Testimony by both Republicans and Democrats confirmed that Senate candidates can campaign effectively and get their messages out under Act 64's limits. Tr. VII:80 (Rivers); Tr.

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[29] Other witnesses who have run both as incumbents and challengers confirmed that candidates can run effective campaigns for the House under the limits. Tr. IX:45-54 (Bristol); Tr. X:181-82 (Kitzmiller); Ex. V:1824 (Fiorillo); Tr. VII:15-18 (Young). Petitioners cite testimony by Representative Neil Randall, an incumbent House member, that he planned to exceed Act 64's limits in order to run effectively for re-election. Randall Br. 9-10. While higher spending might well help Representative Randall fend off a challenger who would otherwise be able to outspend him under Act 64, that does not define the needs of a robust and effective campaign. *See also* Tr. IV:255-56.

[30] The most expensive district is Chittenden County, which includes Burlington and has six seats, but most successful Chittenden County candidates, both challengers and incumbents, spent less than or very close to the Act 64 limit of $16,500 (now adjusted upward for inflation). Ex. IV:1305-06, 1460. Republican challenger Peter Brownell testified that he ran an effective and winning Chittenden County campaign while spending only $11,000. Ex. IV:1349, 1353.

IX:134-135 (Ready); Tr. VIII:64 (Smith); Ex. IV:1359 (Brownell).

The VRSC Petitioners assert that an effective campaign by an "unknown challenger" requires $4,000 to $6,000 for a House seat and $30,000 to $50,000 for a Senate seat. Br. 42. But those figures are based solely on the testimony of Steve Howard, who, as a two-term House incumbent, *rejected* his challenger's request that the candidates abide by a voluntary spending limit. Representative Howard greatly outspent his challengers in his 1996 House race. Tr. IV:198-201. Nothing could illustrate better how high spending levels assist *incumbents* in defeating challengers. Moreover, Howard did not testify that effective Vermont Senate races generally required an expenditure of $30,000-$50,000, but only that *he* would have needed that amount *to defeat* his opponents in his own 1998 Senate race in Rutland County, Tr. IV:171 – an amount he was not even able to raise. Tr. IV:161. One candidate's testimony as to his own aspirational spending level does not establish the benchmark for narrow tailoring.[31]

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[31] In any event, the district court found more credible the testimony of another of Petitioners' witnesses, William Meub, who stated that he got his message out and ran a viable campaign for Senate in Rutland County in 1990 while spending $6,000-$7,000. Tr. IV:48-49, 51 (Meub). *See* Pet. App. 43a.

Petitioners' further claims, including their assertion that "Vermont's spending limits were exceeded by 57% of all senate campaigns and 30% of all house campaigns that filed reports in 1998 (VRSC Br. 39), rely on the flawed analysis of an expert, Clark Bensen, which arbitrarily excluded all of the low-spending campaigns and was riddled with other errors and omissions. Mr. Bensen analyzed only one election year (1998), and omitted from his analysis, even in that year, 130 House candidates and 25 of the 70 Senate candidates, primarily those who spent the lowest amounts on their elections. Tr. III:90, 92. Mr. Bensen acknowledged that "as a data analyst" he "would much have preferred" to look at three election cycles, not just one. *Id.* at 90. He also admitted that he was inconsistent in his methods. He correctly subtracted from Governor Dean's expenditures a $218,000 donation he made to the Democratic Party, because Governor Dean did not spend those funds on his campaign.

With respect to statewide offices, the spending limits similarly will not impede effective campaigns. Indeed, no candidate for Governor, or indeed for any statewide office, chose to join the plaintiffs in challenging the limits.[32] Partly because television advertising is relatively inexpensive in Vermont, Pet. App. 44a, Vermont's gubernatorial campaigns are the second-least expensive in the nation. Tr. V:198-199 (Gierzynski). In the 1994-1998 period, only one candidate – incumbent Governor Dean, in 1998 – exceeded Act 64's limits. J.A. 84-86. A witness for Petitioners confirmed that Republican challenger Ruth Dwyer reached the voters and "did very well" in 1998, notwithstanding that she spent less than $253,000. Tr. IV:54 (Meub); J.A. 84.[33] Thus, the record does not support Petitioners' claim that $600,000 to $800,000 is the benchmark for an effective gubernatorial campaign. *See also* Tr. VIII:64-65 (Smith) (candidates can run effective campaigns for Governor under Act 64 limits); Tr. IX:233-34 (Pollina) (same); Pet. App. 43a (district court rejected testimony of Petitioners' witness that $800,000 to $1 million necessary for effective gubernatorial campaign).[34]

However, Mr. Bensen did not subtract similar donations by various other candidates when calculating their campaign expenditures. Tr. III:97-99. Thus, his report overstates the impact of Act 64's limits on such candidates. If a candidate is donating campaign funds to his party or to another candidate, the funds obviously were not needed to get the candidate's message out to the voters. *See also id.* at 112-14, 143-45 (acknowledging other mistakes and omissions).

[32] With respect to State Auditor only, which was subject to a $45,000 spending limit, Steve Howard claimed he would have considered a run but was discouraged by the limit, Tr. IV:177-78, but there is no evidence that he was capable of raising $45,000.

[33] In fact, the gubernatorial challengers in 1994, 1996, and 1998 all would have had *more* money to spend if Act 64 had been in place, because they could have received public financing of $300,000, an amount they were unable to raise through private donations.

[34] While Petitioners point to extra-record evidence of higher levels of spending in gubernatorial elections that occurred after the trial, the fact that a candidate spent more than the limit does not establish that effective campaigns cannot be conducted under the limit. For example, a state

The limits for other statewide offices also were tailored to allow adequate spending. Lieutenant Governor Douglas Racine testified before the Legislature that in his two bids for the office, "I found that I could run very effective campaigns, both of them, one was a losing effort, one was a winning effort, for $100,000. That's a lot of money." Ex. I:0267 (Act 64 limit was $100,000, now adjusted for inflation). The major party candidates for Lieutenant Governor spent just over $100,000 in two of the three election cycles prior to Act 64. J.A. 84-86. For statewide races below the level of Lieutenant Governor that were subject to a $45,000 limit under Act 64, the average spending by most categories of candidates was less than $30,000 in the three previous election cycles. J.A. 63. Of the few candidates for such offices who spent more than the limits, most were incumbents. J.A. 84-86.

Petitioners err in contending that the only relevant benchmark for effective campaign spending in legislative races is the handful of elections in one election year – 1998 – that were deemed "competitive" by Republican Party leaders and involved large expenditures. Naturally, the handful of highest-spending campaigns will be most affected by a spending limit, but that is nothing more than a tautology. It does not establish that spending in excess of the limits is necessary to run effective or competitive campaigns.[35]

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candidate's spending may reflect efforts to develop a fundraising network and a higher profile to assist later efforts to run for federal office, rather than any increased costs of communication. Because the facts relevant to understanding post-trial elections were not addressed through the adversary process at trial, those elections cannot properly be reviewed here.

[35] For example, four Vermont House challengers (Atkins and Cross in Chittenden 1-1, Hube in Windham 4, and Baker in Rutland 7) defeated incumbents while spending within Act 64's limits in 1998, and another four challengers (Fisher in Addison 2, Mann in Addison-Rutland 2, Lancaster in Windsor 2-1, and Kirchner in Rutland-Bennington 1) ran close races against incumbents while spending within the limits, yet Petitioners excluded all but one of those races in their list of

In fact, by focusing on only a tiny fraction of elections, Petitioners merely expose the poverty of their vision of electoral competition: one in which a handful of party leaders decide, before the campaign even begins, which small group of races will be important, while writing off any meaningful challenge to the incumbent in most races, including primaries. Vermont is not required to embrace such a distorted vision of democracy. A candidate field that has been so narrowed before a single vote has been cast is not the reflection of a healthy political system.

Moreover, the spending on "targeted" races clearly reflects the "prisoner's dilemma" described earlier – the fact that an opponent has an unlimited ability to raise funds. As Petitioners' witness explained: "[T]he other fear was . . . we did not know at the time . . . . how much money the other challenger in the race, Judy Murphy, was going to spend. . . . [T]he fear was that there would be an extraordinary amount of money spent on her campaign through donations from outside Vermont." Tr. II:77 (McNeill).[36]

Petitioners' assumption that a spending limit, to be narrowly tailored, must be set at the highest amounts ever spent by past candidates, is arbitrary and has no more merit than deeming the lowest-spending campaign the benchmark. The evidence of Act 64's narrow tailoring properly includes (but was by no means limited to) examination of overall patterns of spending across elections.[37] That evidence was

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"competitive" elections. Ex. VII:2360-2375; Vermont Secretary of State, http://www.sec.state.vt.us/results (last visited Feb. 7, 2006).

[36] In fact, at least five Republican candidates McNeill identified as potentially harmed by spending limits actually lost their election in 1998 to candidates who *outspent* them. Ex. VII:2355, Col. H; Ex. VII:2358, Col. H.

[37] While Petitioners claim that pre-Act 64 spending figures do not include any of the items that would be considered "related expenditures" under 17 VT. STAT. ANN. § 2809, they ignore the fact that the definition of "expenditure" under former 17 VT. STAT. ANN. § 2801(3), similar to Section 2809, specifically encompassed payments by "any person, committee or group authorized by a candidate" to make an expenditure.

buttressed by individual testimony of knowledgeable Vermont witnesses (including some of Petitioners' witnesses) confirming that the limits permit effective campaigns.[38]

Nor does the narrow tailoring requirement require Vermont to specify separate expenditure limits for primary and general elections. Other states similarly apply campaign finance limits without distinguishing between primary and general elections. *See, e.g.*, MD. CODE ANN., ELEC. LAW § 13-226(b) (2006); HAW. REV. STAT. § 11-191, § 11-204(a) (2006); Wisconsin State Elections Board, Contribution Limits: Candidates for State Office 65 (2004), *available at* http://elections.state.wi.us/docview.asp?docid=1818 (last visited Feb. 7, 2006). Furthermore, in Vermont the primary is held very close to the general election – only two months apart – engendering more of a unified campaign season, which often works to the advantage of a candidate who has run in a successful primary. Pet. App. 60a; Tr. VI:85-86; Tr. VIII:71-72 (Smith). Rather than specifying one limit for the primary and another for the general election, the Vermont Legislature established the overall amount needed and gave candidates the flexibility to determine how to divide their spending. Tr. X:224-25 (Kitzmiller).

Finally, the fact that the limits apply to candidates who are entirely self-funded does not prevent the limits from being narrowly tailored.[39] While Petitioners argue that

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VT. STAT. ANN. tit. 17, § 2801(3) (amended 1997). Thus, there is clearly some overlap. Moreover, unlike the previous definition of expenditure, Act 64's "related expenditure" provision *expressly excludes* from the candidate's spending total all coordinated expenditures of less than $50, *id.* § 2809(b), as well as any expenditure of less than $100 for refreshments and related supplies at an event held to allow a candidate to meet personally with a group of voters, *id.* § 2809(d).

[38] Ex. VII:2700 (Brunelle); Tr. IX:45-54 (Bristol); Tr. X:181-82 (Kitzmiller); Ex. V:1824 (Fiorillo); Tr. VII:15-18 (Young); Tr. VII:80 (Rivers); Tr. IX:134-135 (Ready); Tr. VIII:64-65 (Smith); Ex. IV:1353, 1359 (Brownell); Tr. V:50-51 (Hooper); Tr. IX:233-34 (Pollina).

[39] None of the candidate-petitioners has alleged that he could finance a campaign in excess of Act 64's limits while relying solely on his own

spending by such candidates cannot implicate corruption or time-protection interests, campaign finance limits must apply even-handedly. A system in which most candidates face limits while a few remain free to spend unlimited amounts from their personal fortunes would raise the spectre of discrimination and would be unlikely to win public acceptance. *See* Blasi, *supra*, at 1316. If a limit on candidates' spending is otherwise supported by compelling interests, it is not unconstitutional merely because it brings within its scope some instances of spending that are less likely to pose the dangers that prompted the law. *Buckley*, 424 U.S. at 35 (upholding contribution limits although not all large contributions cause corruption).[40]

2. Less Restrictive Alternatives Are Not Available.

The Second Circuit's remand order requires Respondents to show not only that the spending limits chosen by Vermont permit effective campaigns for office, but also directs the district court to determine whether a system of voluntary spending limits with public financing would equally serve the State's interests. Pet. App. 157a-164a. To be effective, the alternative must be both plausible and feasible. *Ashcroft v. ACLU*, 542 U.S. 656, 666-67 (2004); *United States v. Playboy Entm't Group*, 529 U.S. 803, 815-16 (2000).

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financial resources. Accordingly, none has standing to allege that the limits are unconstitutional as applied to self-funded candidates.

[40] *Amicus* RNC argues that Vermont's spending limit is not narrowly tailored to address the State's time-protection interest because it limits candidates' spending, but does not specifically bar candidates from raising funds in excess of the spending limit. But Vermont certainly could assume that if candidates are limited in the amount they can spend, few if any will see any purpose to raising funds in excess of the limit. In past elections, when candidates have raised more than they spent, it was under a system in which no candidate knew, at the outset, what a potential opponent might be able to spend. If Vermont finds, after experience with spending limits, that candidates habitually are raising more than they are able to spend, the State can always add a provision specifically limiting the amount a candidate can raise.

Plainly, a voluntary system of expenditure limits with public financing is not an effective alternative, because in any given election any candidate who chooses to decline the public funding can thwart the compelling governmental interests served by spending limits.[41] Moreover, if a state has to set the public financing amounts high enough to assure that no non-participating candidate, no matter how well funded, would ever outspend a participating candidate, the system is unlikely to be feasible. Accordingly, no remand is required.

The Second Circuit's remand order also requires Respondents to show that higher limits would not effectuate the State's interests. Pet. App. 161a-64a. Petitioners have not sought to support that aspect of the Second Circuit's narrow tailoring inquiry. Because the spending caps allow ample communication and effective campaigning, they are "precisely targeted to eliminate" the problems that the statute sought to address without inhibiting political discussion and debate. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990). Under these circumstances, an increase in the limit would be "a difference only in degree, not a less restrictive alternative in kind." *See Burson v. Freeman*, 504 U.S. 191, 210 (1992) (plurality opinion) (holding that prohibition on electioneering within one hundred feet of polling place satisfied exacting scrutiny without a showing that the one-hundred-foot boundary was "perfectly tailored"). The limits therefore satisfy the narrow tailoring requirement, and no remand is necessary.

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[41] Indeed, Act 64 provides public financing for the Governor and Lieutenant Governor races, and Vermont thus has had a *de facto* voluntary financing system since 2000, when the mandatory limits were enjoined by the district court; yet no major party candidate in the last two election cycles has chosen voluntary public financing. The collapse of the presidential public funding system in the primary election in 2004 is further evidence of the problem. *See* Briffault, *Return of Spending Limits*, *supra*, at 424-25; *see also* Alexander, *supra*, at 54-58 (explaining why voluntary public financing system is not a feasible less restrictive alternative for protecting officeholder time).

Finally, Petitioners' own proposals are contradictory and self-defeating. When Petitioners argue simultaneously that Vermont's anti-corruption interests are adequately served by lowering the contribution limits, Randall Br. 12, 35, but that the time-protection interest would be served by raising or eliminating the contribution limits, *id.* at 33-34, it is evident that they can offer no feasible alternative to spending limits.

D. As an Alternative, Buckley's Application of Exacting Scrutiny Warrants Reexamination.

In the event that the Court concludes, contrary to the foregoing, that Vermont's expenditure limits do not satisfy the requirements of strict scrutiny, sound reasons exist to revisit the applicable standard of review. For the reasons set forth in Part II of the Brief of Respondents, Cross-Petitioners William H. Sorrell *et al.*, which Respondents join, a test that balances the constitutional interests served by spending limits against any burdens such limits may impose on protected speech is appropriate when, as here, "constitutionally protected interests lie on both sides of the legal equation." *Shrink*, 528 U.S. at 400 (Breyer, J., concurring).

The Court may also uphold Vermont's expenditure limits as a content-neutral regulation of speech.

> The principal inquiry in determining content neutrality, in speech cases generally . . . , is whether the government has adopted a regulation of speech because of disagreement with the message it conveys . . . . Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech."

Ward, 491 U.S. at 791 (1989) (internal citations omitted). A content-neutral law is permissible if it is narrowly tailored to serve a significant government interest and leaves open ample alternative channels for communication of information. *Id.*;

see also Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994).

Ward's emphasis on a regulation's justification is significant because it specifically incorporated the analysis derived from *Renton v. Playtime Theatres, Inc.* 475 U.S. 41 (1986), into the general test for content-neutrality. *See Ward*, 491 U.S. at 804 n.1 (Marshall, J., dissenting). In *Renton*, the Court upheld as content-neutral an ordinance aimed at theatres that showed movies with adult content, 475 U.S. at 43, because the ordinance aimed "at the *secondary effects* of such theaters on the surrounding community," *id.* at 47, and was thus "*justified* without reference to the content of the regulated speech." *Id.* at 48-49 (internal quotations omitted).[42]

Act 64's expenditure limitations meet the standard for content-neutrality outlined in *Ward*. They were not adopted because of disagreement with the message conveyed, and they neutrally apply to all candidates. *See also Buckley*, 424 U.S. at 39 (characterizing FECA's spending limits as "neutral as to the ideas expressed"). Of six legislative findings specific to the issue of spending limits, two relate to preserving the time of officeholders and candidates, J.A. 20 (Sec. 1(a)(1), (2)), four relate to avoiding corruption and the appearance thereof, J.A. 20-21 (Sec. 1(a)(4), (8), (9), (10)), three relate to promoting electoral competition, J.A. 20-21 (Sec. 1(a)(4), (8), (9), (10)), and one relates to democratizing the influence of money on politics, J.A. 20 (Sec. 1(a)(1)). The "predominate concern" of the Vermont Legislature clearly was not the suppression of particular views. *See*

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[42] Contrary to Petitioners' reliance on *Burson*, 504 U.S. at 197 (plurality), this Court has repeatedly reaffirmed that the government's purpose in enacting a regulation is the touchstone for determining content neutrality. *See Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289-96, 310 (2000) (plurality and Souter, J., concurring in part and dissenting in part); *Turner Broadcasting*, 512 U.S. at 642; *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 122 n.* (1991).

Renton, 475 U.S. at 47-48 (examining "predominate concerns" of law); *see also City of Erie*, 529 U.S. at 292 (one legitimate purpose sufficient for determination of content neutrality); *Turner Broadcasting*, 512 U.S. at 646 (examining "overriding objective" of Congress to determine content neutrality).[43]

The application of spending limits only to candidates (and not to other individuals or groups) similarly does not "reflect the Government's preference for [or aversion to] the substance of what the . . . speakers have to say." *Turner Broadcasting*, 512 U.S. at 658. Vermont's spending limits were enacted to preserve *officeholders*' and *candidates*' time and to prevent the corruption or appearance of corruption, interests that would not be served by application of the spending limits beyond candidates. *Simon & Schuster*, 502 U.S. at 122 n.* (statutes may be content neutral despite "incidental effects on some speakers but not others"). The fact that a burden falls upon political speech does not mean that the burden is more than incidental. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 671-72 (1991); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 803 & n.23, 817 (1984). Moreover, even a law that directly regulates speech activity may be subject to intermediate scrutiny. *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 213-214 (1997).

Vermont's content-neutral spending limits further substantial governmental interests and those interests are

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[43] To the extent *Buckley* implicitly suggests that expenditure limits are not content-neutral, that conclusion was based on the specific "equalization" interest asserted in support of the spending limits in FECA and is not applicable to Vermont's candidate spending limits, which rest on distinct interests. *Compare Simon & Schuster*, 502 U.S. at 126 (Kennedy, J., concurring in the judgment) (describing *Buckley*, in part, as "striking down content-neutral limitations on financial expenditures") *with Turner Broadcasting*, 512 U.S. at 657-58 (characterizing independent expenditure limitations in *Buckley* as content-based to the extent they were justified on equalization grounds).

unrelated to the suppression of free expression. *See supra* Part I(B). Given the findings of both courts below that Vermont's spending limits fully permit candidates to communicate their ideas to the voters and run effective campaigns, Pet. App. 42a-44a; *id.* 152a-57a, the record here demonstrates that the burden on speech is only incidental. *See supra* Part I(C)(1). This finding is in contrast to FECA's spending limits, which "represent[ed] substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Buckley*, 424 U.S. at 19.

It is for this reason, as well, that the spending limits leave open ample alternative channels of communication. That is implicit in the fact that Act 64 establishes a limit, not a ban, on campaign spending, and allows for spending at levels which candidates in the past have found wholly adequate for their campaigns. *See Ward*, 491 U.S. at 802. The incidental burden is "no greater than . . . essential" because Vermont's spending limits promote "substantial government interest[s] that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675 (1985).[44]

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[44] Because Vermont's spending limits are constitutionally permissible based on the interests canvassed *supra* at Part I(B), the Court need not revisit *Buckley*'s conclusion that the interest in equalizing the ability to influence elections does not justify expenditure limits. Nevertheless, Respondents agree with those *amici* who contend that an interest in equality is sufficiently compelling to satisfy strict scrutiny review. *See* Br. of *Amici* States and Br. of Equal Justice Society *et al.* When the political marketplace becomes the special province of the winners in the economic marketplace, *Buckley*'s very goal of securing "'the widest possible dissemination of information from diverse and antagonistic sources' " in political campaigns, 424 U.S. at 49 (citations omitted), is defeated. A spending limit that encourages broader participation while permitting candidates to amass the resources they need for effective advocacy of their views thus furthers, rather than restricts, First Amendment goals. *See Shrink*, 528 U.S. at 401 (Breyer, J., concurring) (citing *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)).

To the extent the Court also views *Buckley* as precluding the constitutionality of spending limits based on any of the interests discussed

II. The Second Circuit Correctly Rejected Petitioners' Challenges To Vermont's Regulation of Campaign Contributions

This Court in *McConnell* and *Shrink*, applying its prior ruling in *Buckley*, upheld limits on contributions to electoral candidates on a standard that defers to the expertise of elected legislators. The Second Circuit in this case correctly applied this Court's precedents in upholding contribution limits tailored to the particular circumstances of Vermont's electoral environment.[45] Petitioners' claims are a reprise of arguments repeatedly rejected by this Court, and should once again be rejected.

This Court has consistently upheld contribution limits against First Amendment challenges. *McConnell*, 540 U.S. at 224; *FEC v. Beaumont*, 539 U.S. 146, 149 (2003); *Shrink*, 528 U.S. at 395-96; *Buckley*, 424 U.S. at 29. Under this Court's precedents, such limitations are not subject to strict judicial scrutiny. Rather, legislatures may regulate contributions to combat corruption and the appearance of corruption in electoral politics unless the restriction is "so low as to impede the ability of candidates to 'amas[s] the resources necessary for effective advocacy.'" *Shrink*, 528 U.S. at 397 (quoting *Buckley*, 424 U.S. at 21). The question under the First Amendment is whether the legislative measure is "so radical" in effect as to render "political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink*, 528 U.S. at 397. Courts have no "scalpel to probe" the amount at which a contribution limit should be set to achieve its purpose. *Buckley*, 424 U.S. at 30; *Shrink*, 528 U.S. at 388

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supra at Part I.B, Respondents respectfully request that the Court revisit *Buckley* in that regard.

[45] Candidates for State Representative or local office may accept up to $200, candidates for State Senate or county office may accept up to $300, and candidates for statewide office may accept up to $400. 17 VT. STAT. ANN. § 2805.

("[T]he dollar amount of the limit need not be 'fine tun[ed].'") (quoting *Buckley*, 424 U.S. at 30).[46]

Substantial deference is owed to legislative determinations regarding contribution limitations, as legislators are far more familiar with varying local political conditions that determine whether a limit is appropriate. *McConnell*, 540 U.S. at 137 ("The less rigorous standard of review we have applied to contribution limits . . . shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."). The legislature accordingly is not required to compile a detailed evidentiary record justifying the particular lines it draws. *See Shrink*, 528 U.S. at 393.[47] "[D]ifferences in [the] level [of contribution limits] from state to state should reflect democratic choices, not court decisions." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 459 (1st Cir. 2000) (internal quotations omitted).

The lessened standard of First Amendment scrutiny applicable to limitations on contributions also reflects the minimal effect of such limits on associational and speech

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[46] *Shrink* thus rejects the view of certain lower courts (*Day* v. *Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994); *Russell* v. *Burris*, 146 F.3d 563, 571 (8th Cir. 1998), *cert. denied*, 525 U.S. 1001 (1998)) that *Buckley* applied a narrow-tailoring standard to contribution limits.

[47] Contrary to this settled law, Petitioners would require extraordinary evidentiary showings by legislatures. In arguing that a legislature must present hard "evidence of pre-access demands for contributions conditioned on granting access," VRSC Br. 10, Petitioners conflate "activities which arouse suspicions," *Shrink*, 528 U.S. at 390 (internal quotations omitted), with evidence of actual corruption, an approach that would render meaningless the substantial government interest in combating the appearance of corruption, *e.g.*, *Shrink*, 528 U.S. at 389 (upholding Missouri contribution limits adopted to combat what the public perceived as "politicians too compliant with the wishes of large contributors"). Petitioners similarly ignore *Shrink* by arguing that there was "no evidence at trial that [pre-Act 64] limits failed to deter corruption." Randall Br. 20. This is untrue (*see infra* this Part), but even if it were not, it ignores that the Vermont Legislature has a compelling interest in combating the *appearance* of corruption.

rights. *McConnell*, 540 U.S. at 137, 141; *Shrink*, 528 U.S. at 386-388; *Buckley*, 424 U.S. at 20-26. *Cf.* Pet. App. 42a (even "[s]mall donations are considered to be strong acts of political support in this state"). It also reflects the vital governmental interests furthered by contribution limits: deterring corruption, preventing the appearance of corruption, and assuring public confidence in government. *McConnell*, 540 U.S. at 143-45; *Beaumont*, 539 U.S. at 154; *Shrink*, 528 U.S. at 390; *Buckley*, 424 U.S. at 26-28.

This Court accordingly has sustained two federal contribution limitation schemes in *McConnell* and *Buckley*. In *Shrink*, it also rejected a First Amendment challenge to a Missouri statute that included $1,075 contribution limits for statewide offices. 528 U.S. at 384-85. Relying on *Shrink* and *Buckley*, courts of appeals repeatedly have rejected challenges to state contribution limits set at varying levels.[48]

The Vermont Legislature determined that its limitations were appropriate to the unique circumstances of the state after months of painstaking deliberation and hearing testimony from 145 witnesses. Ex. I:0187 *et seq.*; Ex. II:0412 *et seq.* In addition, at trial, numerous witnesses testified that, under the limits in place prior to Act 64, candidates' reliance

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[48] *See Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1088, 1092 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 47 (2004) ($400 per election for Governor and Lieutenant Governor, $200 for other statewide offices and $100 for any other public office); *Frank v. City of Akron*, 290 F.3d 813, 818 (6th Cir. 2002) ($300 per election for at-large elections and Mayor and $100 for ward elections), *cert. denied*, 537 U.S. 1160 (2003); *Daggett*, 205 F.3d at 452, 459 ($500 for Governor and $250 for all other candidates; $500 and $250 limits for PACs, committees, corporations, or associations); *Shrink Mo. Gov't PAC v. Adams*, 204 F.3d 838, 840 (8th Cir. 2000) ($525 per election for State Senator or other office with electorate of 100,000-250,000, and $275 for State Representative or other office with electorate below 100,000). *See also Fla. Right to Life, Inc. v. Mortham*, No. 6:98-770-CV.ORL-19A, 2000 WL 33733256, at *3, *5, *7 (M.D. Fla. Mar. 20, 2000) ($500 per contested election for legislative elections in which candidates spend average of $108,000 for House seats and $250,000 for Senate seats).

on large campaign contributions continued to undermine public confidence in Vermont's political system.[49] This testimony included the observations and experiences of several current and former state officeholders.[50] Several of Petitioners' own witnesses testified to the same effect. Pet. App. 36a-37a; *see also* Tr. IV:66-72 (Meub); Tr. II:207 (Patch); Tr. IV:220 (Howard); Tr. IV:259 (Randall); Ex. VII:2706 (Brunelle); Tr. III:25-26 (Kuusela). *See also* Pet. App. 37a (district court finding that "[t]here is reason to believe that large campaign contributions have, at times, had an improper influence").

The district court further found that the contribution limits adopted by the Legislature were calibrated to address donations "considered suspiciously large" by the Vermont public, and that gave rise to the corrosive perception of corruption. Pet. App. 59a. *See* Tr. VII:18-21; Tr. VII:80; Tr. IX:226; Tr. VIII:23-24; Ex. III:0747, 0757, 0783-0784, 0791-0793, 0798, 0804 (newspaper articles indicating public suspicion resulting from large contributions permitted under previous contribution limits). Many of Petitioners' own witnesses testified to that public perception. *See* Tr. IV:254 (Randall) ($1,000 contribution from an individual could give appearance that candidate was bought or owned by contributor); Tr. III:25 (Kuusela); Ex. VII:2672-73 (Landell); *see also* Tr. II:201 (Patch) (contributions over one hundred dollars are very large).[51] Indeed, under Vermont's prior

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[49] *See* Tr. VII:147-57; Tr. IX:175-76, 193-98; Tr. V:183-84; Tr. VIII:23-26, 28-38; Tr. IX:56-58; Tr. X:162-63; Ex. V:1843-44, 1847; Tr. VII:41-42.

[50] Tr. X:161-62 (Kitzmiller); Tr. VIII:23-26, 39-40 (Smith); Tr. IX:56-58 (Bristol); Tr. VII:41-42 (Young). This included testimony linking donations to specific legislative actions. *See* Tr. VII:72-74 (Rivers on favorable treatment given to donor seeking tax exemption); Tr. V:55-56 (Hooper).

[51] Petitioners cite polling numbers purporting to show that the public associates corruption only with much larger amounts such as $20,000. VRSC Br. at 9 n.6. The numbers cited, however, were not from a poll of Vermonters, but from a national poll. Tr. VI:135.

limits of $2,000 per election cycle, a sole contributor could fund an average House campaign, and a large portion of a State Senate campaign. J.A. 87-88 (average House campaign spent less than $2,000 and State Senate campaign averaged less than $7,500).

Senator Rivers acknowledged that she gave special consideration to a donor who had contributed between $500 and $1,000 in past campaigns when the donor sought a tax exemption. Tr. VII:72-74. Senator Ready testified that slate industry donors who made $500 donations appeared to get preferential consideration in a development permit law. Tr. IX:88-95, 100-04; Ex. III:0787; Ex. V:1765; Tr. V:23-30; *see* Tr. VII:42 (Young) ($1,000 contributor will be "listened to"). In light of the evidence, the district court properly concluded, applying *Shrink*, that Act 64's lowered contribution limits were appropriate in the circumstances of Vermont, Pet. App. 55a-62a, and the court of appeals was unanimous in affirming that conclusion, Pet. App. 168a-171a, 194a. Petitioners' argument that Vermont is obliged to make a greater evidentiary showing because its limits are supposedly "exceedingly low" (Randall Br. 44) ignores the body of evidence establishing that the limits are in fact both calibrated to the context of Vermont and accord with the perception of the state's citizens.[52]

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[52] Petitioners' *amici* claim that Act 64's contribution limits improperly seek to equalize access to candidates and officeholders in a manner inconsistent with *Buckley*. Br. of *Amicus* Center for Competitive Politics 12-16; *see also* Br. of *Amicus* Sen. McConnell 13 -18. *Amici*'s analysis is suspect. Certainly, a system in which access is for sale is troubling at least in part because citizens stand on a vastly unequal footing in their ability to secure a politician's responsiveness in that manner. But that does not mean that the goal of deterring corruption and undue influence is somehow tainted by the reality of voters' unequal giving power. To the contrary, *Buckley* and subsequent cases recognize that government has a compelling interest in deterring the threat of "politicians too compliant with the wishes of large contributors." *Shrink*, 528 U.S. at 389; *see Buckley*, 424 U.S. at 28 (government entitled to address the "attempts of those with money to influence governmental

Nor do Vermont's limits impede effective advocacy. As discussed *supra*, under *Shrink* and *Buckley*, contribution limits that advance the State's anti-corruption interest are valid unless they produce a "dramatic[ally] adverse effect on the funding of campaigns." *Shrink*, 528 U.S. at 395. The district court, relying on substantial evidence in the record, properly held that Act 64's individual contribution limits had no such effect. The court relied on testimony from a substantial number of witnesses, including state legislators, candidates, and campaign consultants, and on witnesses who had already conducted political campaigns under the Act's contribution limits. That finding is entitled to deference. *Shrink*, 528 U.S. at 396.

The district court's findings reflect Vermont's small population and intimate campaigning style. Vermont is the second-smallest state in the Union in terms of its population. In contrast, Missouri, whose contribution limits this Court approved in *Shrink*, has close to ten times as many people as Vermont.[53] It is predictable, therefore, that campaigns in Vermont would be significantly less expensive than in other parts of the country.

Partly due to the "relatively inexpensive cost of television advertising in the state," statewide candidates can raise sufficient funds to effectively advocate under Act 64's contribution limits. Pet. App. 155a (citation omitted). Even under Petitioners' inflated benchmark for an effective gubernatorial campaign by an unknown challenger, VRSC

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action" through broader means than anti-bribery laws). Vermont citizens were rightly troubled when their Governor admitted that "money does buy access," Ex. III:0902, and nothing in *Buckley* or subsequent cases calls into question the propriety of responding to that concern.

[53] *See, e.g.*, U.S. Census Bureau, State & County Quickfacts (Missouri), http://quickfacts.census.gov/qfd/states/29000.html (last visited Feb. 3, 2006) (Missouri population is 5,595,211); U.S. Census Bureau, State & County Quickfacts (Vermont), http://quickfacts.census.gov/qfd/states/50000.html (last visited Feb. 3, 2006) (Vermont population is 608,827).

Br. 42, a candidate could raise the funds with $400 donations from 1500-2000 individuals or entities, a number equal to less than .33% of Vermont's population (and donors are not required to be from Vermont). If spouses each contributed the maximum, donations from 750-1000 households would suffice. As the evidence canvassed at Part I(C)(1) establishes, effective campaigns can in fact be conducted with far less spending than the amounts suggested by Petitioners.

Senate and House candidates also can raise sufficient funds for their campaigns under Act 64's limits, as the district court expressly found. Pet. App. 40a. The average Senate campaign of less than $7,500, J.A. 87, would require only twenty-five donations. Even at five times the average, the campaign could be funded with 125 donations of $300 (assuming the candidate contributed no funds of her own). In House races, which averaged under $2,000 in spending, J.A. 88, ten $200 contributions would suffice, and at five times that amount, fifty donations would be needed. Evidence from the 1999 Burlington mayoral contest, held under Act 64's $200 limit, showed that both candidates ran fully effective campaigns; even the losing candidate, the court noted, "[b]y his own statements, [had run] an effective campaign." Pet. App. 41a.

Despite the district court's findings, supported by a substantial record, that candidates can advocate effectively under Act 64's contribution limits, Petitioners assert that Vermont's limits impermissibly fail to focus on a small group of "targeted" races. This Court's precedents impose no such requirement. In calibrating its regulation of contributions to ensure that candidates remained able to advocate effectively, the Legislature looked to historical contribution patterns in Vermont, including "cost-per-voter statistics, the level of limits that have survived constitutional challenge elsewhere, the experiences of persons running for office, costs of campaigning, types of campaigns, history of reform, and media reflection of general public sentiment." Pet. App. 56a-

57a. That is comparable to the methodology employed in *Buckley* and *Shrink*, in which this Court approved a broad examination of previous elections in order to assess the likely impact of limits. *Shrink*, 528 U.S. at 395-97; *Buckley*, 424 U.S. at 22 n.23, 26 n.27. Moreover, the contribution limit this Court approved in *Buckley* applied to every federal election, from North Dakota to New York, regardless of the competitiveness or cost of elections in the relevant jurisdiction.

More broadly, Petitioners' approach of setting limits based on the most expensive elections would frustrate Vermont's anti-corruption interest. If Vermont were to set its contribution limits based on the most expensive races highlighted by Petitioners, candidates in the less costly elections could finance their entire campaigns with only a few contributions. Consequently, if Petitioners' rule were adopted, Vermont would be forced to allow corruption or its appearance to infect nearly all of Vermont's legislative races. Consistent with *Buckley* and *McConnell*, this Court should not hamstring the Vermont Legislature by adopting Petitioners' rule.

Petitioners contend that Act 64's contribution limits preclude effective advocacy by challengers. This Court has already rejected nearly identical arguments. *Shrink*, 528 U.S. at 389 n.4 (noting that "*Buckley* squarely faced" such claims). The trial record in this case confirms this Court's understanding. Professor Gierzynski found no systematic difference between the effect of Act 64's contribution limits on incumbents and non-incumbents. J.A. 51-52. In nearly every legislative race that Gierzynski examined prior to the Act's taking effect, either incumbents had raised more money in amounts over the limits than had challengers or the difference was minimal. *Id.* 72, 75.

Further, both Petitioners' and Respondents' witnesses testified that incumbents have greater access to large contributors than do challengers. Tr. IX:127 (Ready); Tr. IV:252 (Randall). Empirical studies of state contribution

limits support this conclusion.[54] The record evidence thus accords with *Buckley*'s observation that a contribution limit would have "the practical effect of benefiting challengers as a class" to the extent incumbents are more likely to attract large contributions. *Buckley*, 424 U.S. at 32.

Further undermining the claim that campaign reforms inherently reflect incumbent self-dealing is the fact that contribution limits have been enacted in many jurisdictions not by the legislature but by referenda and initiative, and are often challenged by the very incumbents whom such limits are alleged to benefit. *Shrink*, 528 U.S. at 382 (observing that Missouri reform law with lower contribution limits was enacted by initiative and later replaced by legislative enactment containing higher limits); *Eddleman*, 343 F.3d at 1087 (reform law approved by voters); *City of Akron*, 290 F.3d at 815-16 (reform law approved by voters; two incumbent city council members sued); *Daggett*, 205 F.3d at 450, 472 (reform law approved by voters; plaintiffs challenging law included incumbent State House and Senate representatives).[55]

CONCLUSION

The decision below should be affirmed to the extent it upheld Act 64's limits on contributions by individuals, parties, and political committees, and its presumption treating certain expenditures by political parties and committees as "related expenditures." It should also be affirmed to the

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[54] Kihong Eom & Donald A. Gross, *Contribution Limits and Disparity in Contributions between Gubernatorial Candidates*, POL. RES. Q. (forthcoming 2006), manuscript at 1, *available at* http://www.uky.edu/~keom0/paper/disparity_Eom.pdf (last visited Feb. 7, 2006) (if anything contribution limits can work to reduce the bias that traditionally works in favor of incumbents).

[55] Petitioners join the more extensive discussion of Act 64's contribution limits, and its separate discussion of the Act's political party limits and rebuttable presumption of coordination, set forth in Parts III, IV, and V of the Sorrell Brief.

extent it held that Vermont's expenditure limits are supported by compelling governmental interests. The decision below should be reversed to the extent it ordered a remand to the district court for further consideration of whether the spending limits are narrowly tailored, and the Second Circuit should instead be instructed to enter judgment for Respondents, Cross-Petitioners as to the constitutionality of Vermont's spending limits. In the alternative, if the Court determines that additional factual development is necessary to determine whether the spending limits are appropriately tailored, the Court should affirm the judgment remanding that issue to the district court.

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